(1) 95-438

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT GARY BERKSON,

Petitioner,

vs.

A. JARED SILVERMAN, CHIEF, NEW JERSEY BUREAU OF SECURITIES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

This action was commenced to enforce an investigative subpoena that was issued by the New Jersey Bureau of Securities (the "Bureau") and delivered by Bureau personnel to Petitioner Robert Gary Berkson at his home in New York seeking to compel his physical appearance and investigative testimony in New Jersey (the "Subpoena"). In *Minder v. Georgia*, 183 U.S. 559, 562 (1902), this Court held that the "law-making power of a State is powerless to make any provision which would result in the compulsory attendance of [out-of-state] witnesses." The Supreme Court of New Jersey upheld enforcement of the Subpoena declaring *Minder* to be no longer good law and, in an *unprecedented* ruling, applied the "minimum contacts" standard of *International Shoe v. Washington*, 326 U.S. 310 (1945), to the issuance, service and enforcement of an extra-territorial investigative subpoena. The Supreme Court of New Jersey acknowledged that its decision was "unusual" (App. 6a) and that review by this Court was indicated, noting that "[u]ltimately, the U.S. Supreme Court may review this decision or a similar one. That review will close the circle and return the issue to the Court that decided *International Shoe*" (App. 23a).

The question presented by this case is as follows: May the New Jersey Bureau of Securities, a state administrative agency, consistent with the Due Process Clause of the Fourteenth Amendment, issue an investigative subpoena to a resident of the State of New York, serve the subpoena in New York purporting to require the non-resident to physically appear and testify in New Jersey and enforce the subpoena in the Courts of New Jersey?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT GARY BERKSON,

Petitioner,

-against-

A. JARED SILVERMAN, CHIEF,
NEW JERSEY BUREAU OF SECURITIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Robert Gary Berkson ("Berkson") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered on August 2, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App. 2a-25a) is reported at 661 A.2d 1266. The opinion of the Superior Court of New Jersey, Appellate Division (App. 26a-30a), is reported at 276 N.J. Super. 6, 647 A.2d 160. The opinion of the Superior Court of New Jersey, Chancery Division, Essex County (App. 31a-52a), is not reported.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on August 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATUTORY PROVISION INVOLVED

N.J. Stat. Ann. § 49:3-68 provides in pertinent part:

> (a) The bureau chief in his discretion (1) may make such private investigations within or outside of this State as he deems necessary to determine whether any person has violated or is about to violate any provision of this law or any rule or order hereunder, or to aid in the enforcement of this law or in the prescribing of rules and forms hereunder, (2) may require or permit any person to file a statement in writing, under oath or otherwise as the bureau chief determines, as to all the facts and circumstances concerning the matter to be investigated, and (3) may publish information concerning any violation of this act or any rule or order hereunder, provided that there shall be no publication until such rule or order becomes effective;

> (b) For the purpose of any investigation or proceeding under this law, the bureau chief or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the bureau chief deems relevant or material to the inquiry;
>
> . . .

STATEMENT OF THE CASE

1. *The Facts*

On December 1, 1992, a subpoena was issued by the New Jersey Bureau of Securities (the "Bureau") purporting to require the physical appearance and testimony of Petitioner Berkson, a resident of the State of New York, in New Jersey on December 17, 1992 in connection with an alleged Bureau investigation (the "Subpoena"). On December 2, 1992, the Subpoena was delivered by Bureau personnel to Petitioner Berkson at his home in East Hills, New York. Petitioner Berkson, through his attorneys, maintained that the Bureau was not authorized to issue and serve an extra-territorial investigative subpoena and, even if it were, such subpoena power is unconstitutional. Petitioner Berkson, therefore, refused to appear in response to the Subpoena.

On or about August 2, 1993, this action was commenced by the Bureau to enforce the Subpoena. Petitioner Berkson cross-moved seeking to dismiss the complaint, discharge the Order to Show Cause and quash the Subpoena.

2. *The Decision of the Chancery Division*

On August 25, 1993, the Superior Court of New Jersey, Chancery Division, Essex County (the "Chancery Division"),

granted an order of enforcement. In an *unprecedented* ruling, the Chancery Division held that the "minimum contacts" standard of *International Shoe Co.*, applicable to the assertion of *in personam* jurisdiction over non-resident defendants in state court actions, applies to the issuance and service of the Bureau's investigative subpoena out-of-state upon the non-resident Petitioner Berkson. The Chancery Division further held that the Bureau's enabling statute empowered the Bureau to issue and serve the out-of-state investigative subpoena and that the New Jersey Rules of Court did not limit the power of the either the Bureau or the courts of the State of New Jersey to enforce such subpoena.

3. *The Decision of the Appellate Division*

Petitioner Berkson appealed the Chancery Division's decision. On June 20, 1994, the Appellate Division reversed the Chancery Division's decision and ordered that the Subpoena be quashed. The Appellate Division held that service of the Subpoena violated Petitioner Berkson's due process rights. The Appellate Division explained that "[c]onsiderations of the witness' contacts with this State are irrelevant" (App. 29a) and that "while that may support initiation of an action here by the NJBS [Bureau] against defendant, it does not countenance issuance of a subpoena to compel appearance and testimony" (App. 29a).

4. *The Decision of the Supreme Court of New Jersey*

The Supreme Court of New Jersey granted the Bureau's Petition for Certification and, on August 2, 1995, reversed the Appellate Division's decision and remanded the matter to the Chancery Division for further proceedings in accordance with its decision (the "Decision"). The Supreme Court of New Jersey thus upheld the investigative subpoena served upon the non-resident Petitioner Berkson outside the State of New Jersey, requiring him to physically appear and testify in New

Jersey; and held that the courts of New Jersey could, consistent with due process principles, enforce the Subpoena. In so doing, the Supreme Court of New Jersey acknowledged that its decision was "unusual" and that review by this Court was indicated, noting that "[u]ltimately, the U.S. Supreme Court may review this decision or a similar one. That review will close the circle and return the issue to the Court that decided *International Shoe*" (App. 23a).

5. ***Application for Stay to the Supreme Court of New Jersey***

On August 9, 1995, Petitioner Berkson made application to the Supreme Court of New Jersey for a stay of enforcement of the Decision and of all of further proceedings in this matter pending the filing and disposition of the Petition for Writ of Certiorari in this Court.

On September 8, 1995, the Supreme Court of New Jersey granted Petitioner's application for a stay only to the extent of ordering that enforcement of the Decision and all other proceedings in this matter be stayed through Friday, September 22, 1995, provided that Petitioner makes application to the Supreme Court of the United States for a stay pending the filing and disposition of the Petition for Writ of Certiorari on or before Friday, September 15, 1995 (App. 1a).

REASONS FOR GRANTING THE WRIT

Petitioner Berkson, a resident of the State of New York, seeks to have this Court review the decision of the Supreme Court of New Jersey which upheld enforcement of an investigative subpoena issued by the Bureau and served upon Petitioner Berkson in New York seeking to compel his physical appearance and investigative testimony in New Jersey. As detailed below, the Supreme Court of New Jersey's holding directly contravenes the well-settled constitutional mandate established by this Court in *Minder v. Georgia*, 183 U.S. 559 (1902) and followed uniformly thereafter and violates Petitioner Berkson's Fourteenth Amendment due process rights.

Briefly by way of background, in an effort to justify its extra-territorial subpoena power, the Bureau relied on N.J. Stat. Ann. § 49:3-68, which provides, in relevant part, as follows:

> **49:3-68. Investigations, subpoenas and ne exeat**
>
> (a) The bureau chief in his discretion (1) may make such private investigations within or outside of this State as he deems necessary to determine whether any person has violated or is about to violate any provision of this law or any rule or order hereunder, or to aid in the enforcement of this law or in the prescribing of rules and forms hereunder, (2) may require or permit any person to file a statement in writing, under oath or otherwise as the bureau chief determines, as to all the facts and circumstances concerning the matter to be investigated, and (3) may publish information concerning any violation of this act or any rule

> or order hereunder, provided that there shall be no publication until such rule or order becomes effective;
>
> (b) For the purpose of any investigation or proceeding under this law, the bureau chief or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the bureau chief deems relevant or material to the inquiry;
>
> . . .

Petitioner argued throughout the proceedings in the New Jersey courts, *inter alia*, that although the Bureau may be authorized to conduct investigations outside the State of New Jersey, the Legislature did not authorize the Bureau to issue, serve and enforce extra-territorial investigative subpoenas. In addition, Petitioner argued that, even if the Bureau was statutorily authorized to issue, serve and enforce extra-territorial investigative subpoenas, such subpoena power would be unconstitutional. In upholding enforcement of the Subpoena, the Supreme Court of New Jersey held, *inter alia*, that N.J. Stat. Ann. § 49:3-68 empowers the Bureau to issue and serve extra-territorial investigative subpoenas and that the grant of such power is constitutional. Petitioner seeks to have this Court review the portion of the Supreme Court of New Jersey's decision upholding the constitutionality of the issuance, service and enforcement of extra-territorial investigative subpoenas.

In *Minder*, this Court categorically declared that the "law-making power of the State is powerless to make any provision which would result in the compulsory attendance of

[out-of-state] witnesses ...." *Minder*, 183 U.S. at 562. Since the State of New Jersey in the case at bar seeks to compel the attendance of the non-resident Petitioner Berkson, *Minder* is directly applicable and controlling. Accordingly, the State of New Jersey is powerless to compel the physical appearance and investigative testimony of the non-resident Petitioner Berkson.

Although the clarity of the *Minder* holding is unquestionable, it is particularly apposite given the facts and circumstances that were presented to this Court for review in that case. Isadore Minder was tried in Georgia on an indictment for murder, convicted and sentenced to death. A motion for a new trial was made upon the ground, among other things, that the trial court erred in proceeding with the case in the absence of material witnesses residing in Alabama. The defendant contended that if he were tried

> without being afforded process by which either to compel the attendance or to procure the depositions of said witnesses, that Defendant, who is a citizen of the United States and a resident of Georgia, would be deprived of his life, liberty, and property without due process of law, and would be denied his right and privilege and immunities as a citizen of the United States in violation of the Constitution of the United States, and particularly the 1st paragraph of the 14th Amendment thereto.

Minder, 183 U.S. at 559. Despite Minder's passionate plea for life, this Court declared that the Georgia state court was powerless to compel the testimony of the Alabama residents. To be sure, if a state court is powerless to compel the testimony of a non-resident witness on behalf of a defendant in a capital case, the Bureau and the courts of the State of

New Jersey are constitutionally powerless to compel the investigative testimony of the non-resident Petitioner Berkson.

Despite this Court's well-established precedent, the Supreme Court of New Jersey cavalierly distinguished *Minder* as a case "decided long before" *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and, in an *unprecedented* ruling, applied the "minimum contacts" standard of *International Shoe* to the issuance and service of an extra-territorial subpoena. The Supreme Court of New Jersey held that, consistent with principles of due process, the Bureau was authorized to subpoena non-resident witnesses "who have purposefully availed themselves of the privilege to enter the New Jersey securities market" (App. 24a). The Supreme Court of New Jersey cited no authority in support of its holding and, in fact, stated that conferring extra-territorial subpoena power on the Bureau was "unusual" (App. 6a). In fact, it is totally unprecedented. The Supreme Court of New Jersey, however, attempted to justify its holding by stressing the need for the states to develop "coherent principles of cooperation" (App. 23a). While cooperation among the states is desirable, as detailed below, such cooperation is constitutionally permissible only when achieved through reciprocal legislation and not through the unfettered judicial expansion of the states' jurisdiction.

In *International Shoe*, this Court held that a state court's assertion of *in personam* jurisdiction over a non-resident defendant in a state court action does not violate the Due Process Clause if the non-resident defendant has "certain minimum contacts with it [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). While *International Shoe* involved the exercise of personal jurisdiction over a non-resident *defendant*, *Minder*

and the matter at bar both involve the law making power of a state to compel the physical appearance and testimony of a non-resident *witness*. And here, an action or proceeding was not even pending. The matter was purely at an investigative stage.

As a witness subpoenaed here in connection with a purported state agency investigation, Petitioner Berkson has neither the status of an accused in a criminal action nor the status of a defendant in a civil action. The Bureau's subpoena, therefore, ought "not be viewed merely as a summons giving *notice* of a complaint initiating a lawsuit against" Petitioner Berkson. *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1311 (D.C. Cir. 1980). Rather, the Bureau's "issuance of the subpoena and the court's enforcement thereof, represent a classic exercise of *compulsory* process, intended to secure the personal appearance of and production of documents by an otherwise unwilling witness through threat of judicial sanctions for noncompliance." *Id.* at 1311. In other words, *Minder* involves the service of compulsory process requiring a physical appearance while *International Shoe* involves the service of notice of the pendency of an action.

There is an extremely critical distinction of constitutional significance between the service of notice of a complaint initiating a lawsuit and the service of compulsory process requiring a physical appearance. *International Shoe* is, therefore, wholly inapplicable to the service of an extra-territorial subpoena. As the D.C. Circuit explained in *Compagnie De Saint-Gobain-Pont-A-Mousson*, *supra*, "[w]hen an agency serves a party with notice of the pendency of an action, it thereby supplies the recipient with information upon which he may base a decision to act or not. When an agency serves *compulsory* process upon a third-party witness, regardless of the technique of service employed, it effectively

compels that witness to do something and threatens him with sanctions should he choose not to comply." *Compagnie De Saint-Gobain-Pont-A-Mousson, supra*, 636 F.2d at 1311. When a complaint is issued and served upon a prospective defendant, the purpose of such service is primarily notice, rather than compulsion. Once the prospective defendant is served with a copy of the complaint, he has the option of litigating and, if he does, of coming into the forum state. Nevertheless, the coercive powers of the court may not be brought to bear upon the defendant to compel him to physically come into the forum state. By contrast, when a witness is served with compulsory process in the form of an investigative subpoena, the consequences of noncompliance are strikingly different. Should the witness fail to comply with the subpoena and fail to physically appear, the full enforcement powers of the courts of the state which issued the subpoena may immediately be brought to bear upon the subpoenaed witness.

The Court of Appeals in *Compagnie De Saint-Gobain-Pont-A-Mousson, supra*, noted that the distinction between service of notice and service of compulsory process is illustrated in the Federal Rules of Civil Procedure. Specifically, the Court explained as follows:

> The distinction between notice and compulsory process, and the implications of that distinction for permissible *modes* of service, is well illustrated in the context of [Federal] civil litigation. Federal Rule of Civil Procedure 4, which governs service of process, is primarily concerned with effectuating notice. To that end, the rule provides for a wide range of alternative methods of service, including registered mail, each designed to insure the receipt of actual notice of the pendency of the

> action by the defendant. By contrast, Federal Rule 45(c), governing subpoena service, does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness' dwelling place. Thus, under the Federal Rules, compulsory process may be served upon an unwilling witness only in person.

Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F.2d at 1312.

As a result of the Supreme Court of New Jersey's holding, Petitioner Berkson, a resident of New York, who at all times relevant was neither an accused in a criminal action nor a defendant in a civil action pending in New Jersey,[1] faces severe consequences in New Jersey if he fails to comply with the extra-territorial investigative subpoena purportedly served upon him by making a physical appearance in New Jersey. This result is patently unconscionable and unconstitutional. As the Supreme Court of New Jersey's holding itself confirms, there exists no basis or authority to support the application of the *International Shoe* "minimum contacts" standard to the issuance, service and enforcement of extra-territorial subpoenas; and, in light of the critical distinction between service of compulsory process and service of notice of the pendency of an action, applying *International Shoe* to this case violates Petitioner Berkson's due process rights.

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[1] On August 9, 1995, Respondent filed a civil action against Petitioner and others in the Superior Court of New Jersey, Chancery Division-General Equity, Essex County. Respondent nevertheless insists on pursuing its alleged right to compel Petitioner to physically appear and testify in New Jersey in response to the previously issued investigative subpoena.

Moreover, while the Supreme Court of New Jersey recognized that "conferring extraterritorial subpoena authority on the Bureau is unusual" (App. 6a), it incorrectly stated that such authority is available through reciprocal legislation. On the contrary, reciprocal legislation such as the Unif. Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (the "Uniform Act"), 11 U.L.A. 1 (Master ed. 1995), were adopted solely because of, and in an attempt to deal with, the jurisdictional limitations of the states within our federal system. *See New York v. O'Neill*, 359 U.S. 1 (1959); *Walker v. Coiner*, 474 F.2d 887 (4th Cir. 1973), *cert. dismissed*, 413 U.S. 901 (1973) ("Prior to 1931, there existed no means by which a state could compel the attendance of a witness from outside the state. [cites omitted] To remedy this situation, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings.")

The Uniform Act has been adopted by all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands. Under the Uniform Act, a state seeking to secure the attendance of a witness in a criminal case who is a resident of another state does not in any way exercise jurisdiction over the out-of-state witness. Instead, by virtue of reciprocal legislation, there exists a uniform procedure whereby the forum state may *ask* -- not compel -- the state in which the witness is resident to *aid* in the forum state's criminal proceeding. Nowhere in the Uniform Act does it provide for extra-territorial service of a subpoena. In any event, it is clear that only the witness' home state may exercise jurisdiction over the witness whose testimony is sought.

This Court in *O'Neill*, *supra*, upheld the constitutionality of the Uniform Act on the ground that a state's power to render up a material witness within its borders to a sister state

is an inherent implication of our federal system. In that case, this Court explained the significance of the Uniform Act as follows:

> The primary purpose of this Act [the Uniform Act] is not eleemosynary. It serves a self-protective function for each of the enacting States. By enacting this law the Florida Legislature authorized and enabled Florida courts to employ the procedures of other jurisdictions for the obtaining of witnesses needed in criminal proceedings in Florida. Today forty-two States and Puerto Rico may facilitate criminal proceedings, *otherwise impeded by the unavailability of material witnesses, by utilizing the machinery of this reciprocal legislation to obtain such witnesses from without their boundaries.*

O'Neill, supra, 359 U.S. at 9 (emphasis added). This Court recognized that the states have limited jurisdiction and further extolled the benefits of such reciprocal legislation as follows:

> These extra-constitutional arrangements are designed to solve "problems created by a constitutional division of powers without disturbance of the federal nature of our government."

O'Neill, supra, 359 U.S. at 9 (quoting CLARK, JOINT ACTIVITY BETWEEN FEDERAL AND STATE OFFICIALS, 51 Pol. Sci. Q. 230, 269). Finally, this Court declared that:

> The Constitution of the United States does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and *as to which the range of authority restricted within an*

> *individual State is inadequate*. By reciprocal, voluntary legislation the States have invented methods to accomplish fruitful and unprohibited ends ... Comity among States, an end particularly to be cherished when the object is enforcement of internal criminal laws, is not to be defeated by an a priori restrictive view of state power.

O'Neill, supra, 359 U.S. at 11 (emphasis added). In the case at bar, the Bureau seeks to circumvent the mandated constitutional route of reciprocal legislation by attempting to exercise jurisdiction directly over the non-resident Petitioner Berkson. Indeed, since it is clear under *Minder, supra*, that, in connection with a criminal proceeding, the forum state may not compel the testimony of a non-resident witness, *a fortiori*, the State of New Jersey certainly may not compel the testimony of the non-resident Petitioner Berkson in connection with a purported agency investigation.

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const amend. XIV, § 1. The State of New Jersey is not the Federal government. The Supreme Court of New Jersey's opinion, however, unconstitutionally empowers the Bureau with almost universal investigatory authority equal to that of the United States Securities and Exchange Commission. The Bureau is a state administrative agency whose powers are by definition limited to the state's borders. Should Petitioner Berkson be susceptible to subpoena in New York by the Bureau or for that matter any other state's agency, he will

clearly be deprived of the due process rights guaranteed to him under the Fourteenth Amendment to the Constitution.

Moreover, the Decision conflicts with the decisions of other state courts of last resort which have cited *Minder* after *International Shoe* for the proposition that, but for the Uniform Act, a state is powerless to compel the attendance of an out-of-state witness. *See, e.g., State v. Cavanaugh*, 69 Cal. 2d 262, 444 P.2d 110, 70 Cal. Rptr. 438 (1968); *State v. Carter*, 37 N.Y.2d 234, 333 N.E.2d 177, 371 N.Y.S.2d 905 (1975); *State v. Tindall*, 294 N.C. 689, 242 S.E.2d 806 (1978); *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953); *State v. Smith*, 87 N.J. Super. 98, 102 (N.J. Super. Ct. App. Div. 1965).

This Petition for Writ of Certiorari should be granted for the following reasons:

1. The Supreme Court of New Jersey's decision directly conflicts with this Court's decision in *Minder*. *See Limbach v. Hoover & Allison Co.*, 466 U.S. 353, 362 (1984) ("[w]e are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court"); *Hudson v. Louisiana*, 450 U.S. 40 (1981); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974); Sup. Ct. R. 10(c).

2. In an unprecedented ruling, the Supreme Court of New Jersey applied the *International Shoe* "minimum contacts" standard to the issuance, service and enforcement of an extra-territorial investigative subpoena. *See Bullington v. Missouri*, 451 U.S. 430 (1981); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

3. The Decision conflicts with the decisions of other state courts of last resort which have cited *Minder* for the proposition that, but for the Uniform Act, a state is powerless to compel the attendance of an out-of-state witness. *See* Sup.

Ct. R. 10(b); R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.25 (7th ed. 1993).

It cannot be overemphasized that the Supreme Court of New Jersey characterized its unprecedented decision as "unusual" (App. 6a). Recognizing that it was venturing into heretofore unconstitutional territory, it invited review by this Court, stating that "[u]ltimately, the U.S. Supreme Court may review this decision or a similar one. That review will close the circle and return the issue to the Court that decided *International Shoe*" (App. 23a).

CONCLUSION

This case squarely presents the question of whether the *International Shoe* "minimum contacts" standard is applicable to the issuance, service and enforcement of an extra-territorial investigative subpoena. Certiorari should be granted so that (i) such question can be returned to this Court, which decided *International Shoe*; (ii) the conflict between *Minder* and the decision of the Supreme Court of New Jersey can be finally resolved; and (iii) the permissible bounds of a state's subpoena power can be definitively established.

This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted,

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September 1995

APPENDIX

SUPREME COURT OF NEW JERSEY
M-110 September Term 1995
38,971

A. JARED SILVERMAN, ETC.,

Plaintiff-Respondent,

v. ORDER

ROBERT GARY BERKSON,

Defendant-Movant.

This matter having been duly presented to the Court, it is

ORDERED that the motion for stay pending an application for a writ of *certiorari* is granted through Friday, September 22, 1995, provided that movant makes application to the Supreme Court of the United States for a stay pending a petition for a writ of *certiorari* on or before Friday, September 15, 1995, and it is further

ORDERED that the failure to make the application for a stay pursuant to this Order or the denial of relief by the Supreme Court of the United States shall cause the stay provided for herein to dissolve automatically.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 7th Day of September, 1995.

STEPHEN W. TOWNSEND

CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
A-97 September Term 1994

A. JARED SILVERMAN, CHIEF
NEW JERSEY BUREAU OF SECURITIES,

Plaintiff-Appellant,

v.

ROBERT GARY BERKSON,

Defendant-Respondent.

Argued March 13, 1995 -- Decided August 2, 1995

On certification to the Superior Court, Appellate Division, whose opinion is reported at 276 *N.J. Super.* 6 (1994).

Michael Pariser, Deputy Attorney General, argued the cause for appellant (*Deborah T. Poritz*, Attorney General of New Jersey, attorney; *Andrea M. Silkowitz*, Assistant Attorney General, of counsel).

Richard F. Horowitz, a member of the New York bar, argued the cause for respondent (*Hellring, Lindeman, Goldstein & Siegal*, attorneys; *James A. Scarpone*, on the brief).

The opinion of the Court was delivered by O'HERN, J.

This appeal concerns the authority and power of a New Jersey agency investigating securities transactions involving New Jersey residents to issue a subpoena to a witness outside of the State's boundaries, and the corresponding authority and power of a New Jersey court to enforce such a subpoena. We hold that (1) the New Jersey Bureau of Securities (the Bureau) may subpoena a nonresident who has engaged in purposeful conduct expressly aimed at the New Jersey securities market; and (2) a New Jersey court may, consistent with due process principles, enforce such a subpoena.

I

The case arises from the Bureau's investigation of securities transactions involving New Jersey residents. The Bureau's complaint states that it is conducting an investigation into the trading practices of L.C. Wegard & Co., Inc., and Hibbard Brown & Co., Inc., brokers-dealers registered with the Bureau, and of others. In connection with that investigation, the Bureau issued a subpoena to Robert Gary Berkson, requiring him to appear at the Bureau's office in Newark, New Jersey, to testify about certain securities transactions. Bureau personnel personally served Berkson with the subpoena at his home in East Hills, New York. Berkson declined to appear in response to the subpoena. Berkson's attorneys inform us that he "is not seeking to prevent the Bureau from conducting investigations or instituting proceedings; he is only seeking to prevent the unconstitutional use by the Bureau of an extraterritorial subpoena."

Pursuant to *N.J.S.A.* 49:3-68, the Bureau applied to the Superior Court for an order enforcing its subpoena. The Chancery Division granted an order of enforcement. It found that Berkson was an "artful manipulator" of the securities

industry in New Jersey, that he "had repeated substantial contacts within New Jersey related to the Bureau's pending investigation," and that "[i]t was certainly reasonable to anticipate that Berkson, who was packaging * * * securities for sale to New Jersey investors, could have anticipated that he would be subject to jurisdiction within the State." The court concluded that "[t]o allow [Berkson] to reside in New York, do business in New Jersey more than minimally, and [affect] a well-regulated industry in New Jersey, without fear of investigation or subpoena, is offensive to traditional notions of fair play and substantial justice."

Berkson appealed. The Appellate Division reversed the Chancery Division's decision and ordered that the subpoena be quashed.

> Pursuant to long-arm jurisdiction, New Jersey allows service of a summons and complaint to the fullest extent possible in order to afford due process of law, and maintenance of an action with this type of service of process does not offend notions of fair play and substantial justice. We agree with the trial judge that defendant had minimum contacts with this State, but while that may support initiation of an action here by [the Bureau] against defendant, it does not countenance issuance of a subpoena to compel appearance and testimony.
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> * * *
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> Service of the subpoena here violates defendant's due process rights. A court cannot accord an agency's subpoena

> greater power than a subpoena issued in the name of the court via enforcement.
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> [276 *N.J. Super.* 6, 9-10 (1994) (citations omitted).]

The court observed that "[u]nder authority of *R.* 4:11-5, non-party witnesses may be compelled to testify at a deposition in another state and the deposition may be used in an action here," and that "[i]t is this type of procedural format envisioned by *N.J.S.A.* 49:3-68 [the statute authorizing the Bureau to issue subpoenas]." *Id.* at 9. We granted the Bureau's petition for certification, 138 *N.J.* 268 (1994).

While the Bureau's appeal was pending in this Court, the Bureau, in accordance with a suggestion in the Appellate Division opinion, moved in the Chancery Division, pursuant to *Rule* 4:11-5, for issuance of an open commission to take Berkson's testimony in New York. The Bureau made a similar motion for issuance of an open commission to take the testimony of Peter F. Hibbard in Maryland. The Bureau described Hibbard as "a broker-dealer at the heart of the Bureau's investigation." The Chancery Division entered orders directing issuance of open commissions to take the testimony of Berkson and Hibbard in their respective states. Following oral argument before this Court, the Appellate Division reversed the decision of the Chancery Division issuing those commissions to take the out-of-state testimony. *In re Berkson*, 280 *N.J. Super.* 180 (1995). It reasoned that its opinion in *Silverman*, *supra*, 276 *N.J.* Super. 6, did not envision the use of *Rule* 4:11-5 to authorize the issuance of a commission to compel the testimony of an out-of-state resident "solely for investigative purposes." 280 *N.J. Super.* at 183-84.

II

The first question in this case is one of agency authority. Government agencies have only those powers the Legislature confers on them. *General Assembly v. Byrne*, 90 *N.J.* 376, 393 (1982). Unless compelled to do otherwise, courts seek to avoid a statutory interpretation that might give rise to serious constitutional questions. *New Jersey Bd. of Higher Educ. v. Shelton College*, 90 *N.J.* 470, 478 (1982). Conventional wisdom might suggest, as the Appellate Division concluded in *Berkson, supra*, 280 *N.J. Super.* at 184, that "[i]f the Legislature had wished to bestow such extraordinary extraterritorial authority upon the Bureau, it could have done so in plain language." That court's conclusion was "reinforced by the absence of any provision in New Jersey's version of the Uniform Securities Law affording a procedure for the Bureau to take out-of-state testimony of a non-resident witness." *Ibid.* The court noted that the 1985 version of the *Uniform Securities Act* (not adopted in New Jersey, New York, or Maryland) specifically provided for the taking of testimony in the state of a nonresident witness for the purpose of an investigation being conducted in another state. *Ibid.*

We understand that conferring extraterritorial subpoena authority on the Bureau is unusual; to our knowledge, no other jurisdiction grants such authority to its agencies except through reciprocal legislation, such as in the *Uniform Securities Act*. On the other hand, our courts have consistently recognized that

> powers expressly granted to an administrative agency should be liberally construed so that the agency can fulfill the Legislature's purpose, *Barry v. Arrow Pontiac, Inc.*, 100 *N.J.* 57, 70 (1985), and that an agency's express authority is augmented by such incidental authority as

> may be reasonably necessary or appropriate to effectuate the expressly delegated authority, *New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562 (1978).
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> [*In re Solid Waste Util. Customer Lists*, 106 *N.J.* 508, 516 (1987).]

Thus, for example, in *Customer Lists* we inferred that even in the absence of an express authority conferred on it, the Board of Public Utilities might require solid-waste haulers to provide it with proprietary information, such as customer lists. *Ibid.* And finally we have, when the interpretation is reasonable, deferred to an agency's interpretation of its own enabling act. "Where a statute is silent or ambiguous, 'it is our clear duty to choose that construction which will carry out the legislative intent of the statute as a whole * * *.'" *Accountemps v. Birch Tree Group, Ltd.*, 115 *N.J.* 614, 622 (1989) (extending regulation of employment practices to out-of-state agencies doing business in New Jersey) (quoting *Horwitz v. Reichenstein*, 15 *N.J.* 6, 8 (1954)).

In this case, the Bureau and respondent insist that the statute is neither silent nor ambiguous, and that the statute's language plainly resolves the issue in their favor. Respondent acknowledges that *N.J.S.A.*, 49:3-68(a) authorizes the Bureau to conduct investigations within and without the State. The authority to subpoena in *N.J.S.A.* 49:3-68(b), however, is silent about whether a subpoena may be issued both within and without the State. Thus, according to respondent, the Legislature did not intend that a subpoena be issued outside of the State. The Bureau contends that the absence of any restriction implies that the Legislature intended that the Bureau's subpoena power reach the limits of the Constitution.

Federal courts have required a clear expression from Congress before authorizing extraterritorial service of an investigative subpoena. *See, e.g., Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492-93 (D.C. Cir. 1984). However, entry upon the territory of another nation is far more intrusive than the services of a subpoena in another state. We are not inclined to create a presumption against any legislative intent that the subpoena power extend beyond our borders. We realize there may have been a settled understanding that under judicial rules of practice and procedure in New Jersey a subpoena could not be served outside New Jersey. Recall, however, Justice Brennan's concurring opinion in *Burnham v. Superior Court*, 495 *U.S.* 604, 631, n.3, 110 *S.Ct.* 2105, 2122, n.3, 109 *L. Ed.* 2d 631, 652, n.3 (1990), noting that it should not be assumed "that there is no further progress to be made and that the evolution of our legal system, and the society in which it operates, ended 100 years ago."

Had the Legislature resolved this issue with sufficient clarity, there would be no debate about the agency's powers. We believe, however, that general principles of administrative law suggest that the Legislature intended the agency to have the authority necessary to fulfill its function to investigate, within and without the State, securities transactions involving New Jersey residents. We must then turn to the questions of constitutional jurisdiction.

III

In an analogous context, a federal court wrote: "The jurisdictional questions posed by this case are peculiarly complex because the jurisdiction of three institutions is at issue * * * ." *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-'a-Mousson* (*SGPM*), 636 *F.*2d 1300, 1315 (D.C. Cir. 1980)). The questions here involve: (1) the

jurisdiction of a state to exercise authority over a nonresident; (2) the jurisdiction of an administrative agency of such a state to exercise that authority in the name of the state through the issuance of an administrative order (a subpoena) to the resident of a foreign state; and (3) the jurisdiction of a court of the issuing state to enforce such a subpoena when the party subpoenaed is not physically present in the issuing state. *Cf. id.* at 1315-22 (using similar approach to decide validity of service of federal agency subpoena on French corporation by registered mail). We shall consider those questions separately. (We refer to a "state" as a state of the United States, unless we identify the state as being a foreign nation.)

A.

Does a state have jurisdiction to exert authority over nonresidents?

A lawsuit is not the only manner in which a state may exert authority over a nonresident. The landmark case of *Pennoyer v. Neff*, 95 *U.S.* 714, 733, 24 *L. Ed.* 565, 572 (1878), held that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment. Perhaps influenced by Austinian concepts of law, *Pennoyer* held that jurisdiction to adjudicate derived from a "power" theory of a state's "exclusive jurisdiction and sovereignty over persons and property within its territory." 95 *U.S.* at 722, 24 *L. Ed.* at 568. It drew on principles of "public law" derived from Justice Story's *Commentaries on the Conflict of Laws*:

> [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L., ch. 2; Wheat. Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the

> exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. L., sec. 539.
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> [95 *U.S.* at 722-23, 24 *L. Ed.* at 568-69]
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> Later years, however, saw the weakening of the Pennoyer rule. In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an "inevitable relaxation of the strict limits on state jurisdiction" over nonresident individuals and corporations. Hanson v. Denckla, 357 US 235, 260, 2 L Ed 2d 1283, 78 8 Ct 1228 (1958) (Black, J., dissenting).
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> [*Burnham, supra*, 495 *U.S.* at 617, 110 *S. Ct.* at 2114, 109 *L. Ed.* 2d at 643.]

The U.S. Supreme Court formerly resorted to various fictions, such as implied consent. *E.g., Hess v. Pawloski*, 274 *U.S.* 352, 47 *S. Ct.* 632, 71 *L. Ed.* 1091 (1927). Eventually,

in *International Shoe Co. v. Washington*, 326 *U.S.* 310, 66 *S. Ct.* 154, 90 *L. Ed.* 95 (1945), the Court cast those fictions aside and held that a state court's assertion of personal jurisdiction does not violate the Due Process Clause if the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 *U.S.* at 316, 66 *S. Ct.* at 158, 90 *L. Ed.* at 102 (quoting *Milliken v. Meyer*, 311 *U.S.* 457, 463, 61 *S. Ct.* 339, 343, 85 *L. Ed.* 278, 383 (1940)). The concomitant understanding of legislative jurisdiction was similarly modified.

> Until recently, it was unclear whether the due process limitation upon a state's extraterritorial application of law mirrored the due process analysis for determining the limits of a state court's judicial jurisdiction. The concepts are closely linked, and commentators have suggested that essentially the same principle should be applied with reference to both situations.
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> [*McCluney v. Jos. Schlitz Brewing Co.*, 649 *F.*2d 578, 581 (8th Cir.), *aff'd*, 454 *U.S.*, 1071, 102 *S. Ct.* 624, 70 *L. Ed.* 2d 607 (1981).]

In *Allstate Insurance Co. v. Haque*, 449 *U.S.* 302, 312-13, 101 *S. Ct.* 633, 640, 66 *L. Ed.* 2d 521, 531 (1981), the Court said that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

That elucidation mirrors the principle of prescriptive jurisdiction among nations. "It has long been settled law that a country can regulate conduct occurring outside its territory which causes harmful results within its territory." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 *F.*2d 909, 922 (D.C. Cir. 1984). Similarly, a state may proscribe conduct occurring outside its borders. In the criminal context, "[t]he common law adopts as the principal basis of jurisdiction a territorial theory of jurisdiction over crimes: a state has power to make conduct or the result of conduct a crime if the conduct takes place or the result happens within its territorial limits." 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal law* § 2.9(a), at 180 (1986) (footnotes omitted). The New Jersey Code of Criminal Justice reflects that understanding of a state's jurisdiction. A person may be convicted under the laws of this State of an offense if "[e]ither the conduct which is an element of the offense or the result which is such an element occurs within this State." *N.J.S.A.* 2C:1-3(1).

On the civil side, "[a] State's power over its own citizens should extend to protection of its own citizens' rights when dealing with others even though there may be incidental effects in other jurisdictions." *Instructional Svs., Inc. v. Computer Curriculum Corp.*, 130 *N.J.* 324, 370 (1992). Because the power to exert authority over nonresidents exists as a matter of sovereignty, we turn to the next question.

B.

May a state authorize its agencies to subpoena a nonresident to testify or produce documents in the forum state?

The Appellate Division reasoned that because a judicial subpoena may not be served beyond the State's boundaries, a court may not enforce an administrative subpoena issued

beyond the State's boundaries. We find, however, that the power to issue a subpoena and the power to enforce a subpoena are different incidents of sovereignty, and such powers are not necessarily identical. A federal court considering a related issue explained that "[a] federal court's jurisdiction [to enforce a grand jury subpoena] is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction." *In re Marc Rich & Co., A.G.*, 707 *F.*2d 663, 669 (2d Cir.), *cert. denied*, 463 *U.S.* 1215, 103 *S. Ct.* 3555, 77 *L. Ed.* 1400 (1983).

A subpoena is simply "a command to appear at a certain time and place to give testimony upon a certain matter." *Black's Law Dictionary* 1279 (5th ed. 1979). "[T]he very etymology of the word 'subpoena' signifies 'an order with a penalty for disobedience.'" *In re Simon*, 297 *F.* 942, 945 (2d Cir. 1924) (quoting *Burns v. Superior Court*. 73 *P.* 597, 598 (Cal. 1903)). Under our law,

> the acquisition of jurisdiction over a foreign corporation through the process of subpoena is governed by the same principles of jurisdiction which apply in the case of civil litigation involving the process of a summons. Both a subpoena and a summons are forms of judicial process by way of orders of the court resulting in potential sanctions for disobedience.
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> [*In re Subpoena Duces Tecum, Inst'l Management Corp.*, 137 *N.J. Super.* 208, 216 (App. Div. 1975).]

The question is whether a different principle should apply when a state agency issues an order in the form of a subpoena.

Cases analyzing a federal court's authority to enforce subpoenas issued by federal agencies to foreign corporations have first examined the agency's statutory authority to issue the subpoena extraterritoriality. Thus, in *Nahas*, *supra*, 738 *F.*2d 487, the court found that the authority of the Commodity Futures Trading Commission was, at that time, strictly limited by 7 *U.S.C.* § 15 to requiring the attendance of witnesses and the production of records "from any place in the United States or any State at any designated place of hearing."[1] The *Nahas* court relied on a presumption that federal legislation is meant to apply within the territorial jurisdiction of the United States, and it would not infer the existence of the power to serve an investigative subpoena on a foreign national in a foreign country. *Id.* at 493. The court emphasized, however, that "this case does not pose a question about the authority of Congress; rather, it poses a question about the congressional intent embodied in 7 U.S.C. § 15." *Id.* at 4985.

A federal court will enforce an investigative subpoena issued to a foreign national when it has personal jurisdiction over the subpoenaed party. *In re Sealed Case (Iran-Contra Investigation*, 832 *F.*2d 1268, 1272 (D.C. Cir. 1987). A federal court has personal jurisdiction over an individual or business concern with respect to activities or effects within the United States if that entity has certain minimum contacts

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7 U.S.C. § 15 has since been amended to allow that agency to require the attendance of witnesses and the production of records "from any place in the United States, any State, or any foreign country or jurisdiction at any designated place of hearing."

with the United States. *Id.* at 1273 (citing *International Shoe*, *supra*, 326 *U.S.* at 316, 66 *S. Ct.* at 158, 90 *L. Ed.* at 102). Thus, in *March Rich*, *supra*, 707 *F.*2d 663, the court found that a Swiss trading company doing business in the United States could be required to respond to a grand jury subpoena served on a representative within the forum. (Jurisdiction over a representative of the subpoenaed nonresident is insufficient; the nonresident entity must itself have the requisite contacts. *Sealed Case (Iran-Contra Investigation)*, *supra*, 832 *F.*2d at 1272-73.)

Although the analogy is less precise in the domestic context than in the international context (after all, the federal government unquestionably may issue process across state lines), we do note that federal courts analyzing issues of enforcement of nationwide subpoenas by federal agencies have drawn a distinction between the agency's statutory authority to issue the subpoena and the corresponding grant of jurisdiction to a federal court to enforce the subpoena. Although a federal district court's process is generally confined to the territorial limits of the state in which it sits, extraterritorial service of process is proper "when authorized by a statute of the United States." *Fed. R. Civ. P.* 4(k)(1)(D). The Federal Trade Commission, for example, has the authority to compel the attendance and testimony of witnesses "from any place in the United States, at any designated place of hearing." 15 *U.S.C.* § 49. In *Federal Trade Commission v. Browning*, 435 *F.*2d 96 (D.C. Cir. 1970), the court upheld the FTC's statutory power to subpoena witnesses in any district in which an inquiry is being carried on, and the corresponding district court's power to enforce such a subpoena. In *Federal Election Commission v. Committee to Elect Lyndon La Rouche*, 613 *F.*2d 849, 858 (D.C. Cir. 1979), *cert. denied*, 444 *U.S.* 1074, 100 *S. Ct.* 1019, 62 *L. Ed.* 2d 755 (1980), the court upheld the authority of the FEC

(with which Congress has vested "broad powers of compulsory process." *id.* at 860) to issue nationwide subpoenas, giving it substantial leeway in selecting its place of inquiry for subpoena-enforcement purposes.

We believe that, consistent with the principles of *International Shoe*, a State agency may require the appearance of witnesses from outside New Jersey. It is true that there is a difference between this case and *International Shoe*. "The distinction between service of notice and service of compulsory process is a crucial one under principles of both domestic and international law." *SGPM*, *supra*, 636 *F.*2d at 1311. *International Shoe* held only that if a cause of action arises within a state, and if it is fair to make a party come into the state to defend, then the action may proceed under pain of default judgment. The forum state does not care whether the defendant comes in or not. It does not order the party to attend; it does not tell the defendant to do anything. The conclusion does not inevitably follow from *International Shoe* that if a state may exercise personal jurisdiction pursuant to long-arm service, it may exercise its jurisdiction to subpoena to the same limits. A subpoena compels a person to do something. Long-arm service of process is a state's assertion of jurisdiction, not over a person, but over a cause of action. Such a nonresident is afforded the opportunity to defend, but need not do so--the consequence being a judgment entitled to full faith and credit.

Still, we believe that the measures of sovereign power are ultimately the same. The concepts of "jurisdiction to prescribe" ("the authority of a state to make its law applicable to persons or activities") and "jurisdiction to adjudicate" ("the authority of a state to subject particular persons or things to its judicial process"), 1 *Restatement (Third) of Foreign Relations Laws of the United States* Part IV, at 231 (1987), are closely linked. Under principles of international law, "a

nation having some 'basis' for jurisdiction to prescribe law" may do so unless "exercising that jurisdiction 'with respect to a person or activity having connections with another [nation] * * * is unreasonable.'" *Hartford Fire Ins. Co. v. California*, __ *U.S.* __, __, 113 *S. Ct.* 2891, 2921, 125 *L. Ed.* 2d 612, 653 (1993) (Scalia, J., dissenting) (quoting *Restatement (Third) of Foreign Relations, supra* § 403(1)). Is not that articulation of the power to prescribe (albeit expressed in the international context) almost identical to *International Shoe*'s delineation of the jurisdiction to adjudicate consistent with due process principles? *McCluney, supra*, 649 *F.*2d at 581. See *International Management, supra*, 137 *N.J. Super.* at 216 (equating the jurisdiction to subpoena with the jurisdiction to serve initial process).

Respondent relies on *Minder v. Georgia*, 183 *U.S.* 559, 562, 22 *S. Ct.* 224, 225, 46 *L. Ed.* 328, 330 (1902), for the proposition that "the lawmaking power of the state is powerless to make any provision which would result in the compulsory attendance of the [out-of-state] witnesses * * * ." *Minder* was decided long before *International Shoe*, but even then it would have been only marginally relevant to the issues here. The issue in *Minder* was whether a criminal defendant in Georgia had received a fair trial when he could not subpoena material defense witnesses who were outside Georgia. At that time, Georgia law made no provision to subpoena out-of-state witnesses. (That issue has since been addressed by the *Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*, adopted in New Jersey as *N.J.S.A.* 2A:81-18 to -23.)

The question in this case is not whether a state may compel attendance in the forum of any out-of-state witness, but rather whether it may require the attendance of one who has purposely availed himself of the privilege of entering regulated securities markets in the forum state. Finally,

personal service of the subpoena within the territorial boundaries of the issuing state is not a prerequisite to a valid administrative order to appear. In his concurring opinion in *SPGM*, *supra*, 636 *F.*2d at 1327, Judge McGowan observed that Congress had explicitly authorized extraterritorial service by registered mail of civil investigative demands in antitrust matters. *See also id.* at 1321 (majority opinion) (discussing agency's subject matter jurisdiction and technique of service, and investigative demands and issues of enforcement jurisdiction). We agree that absent "purposeful availment," the jurisdiction to proscribe conduct in another forum would not suffice to confer jurisdiction to enforce a civil investigative demand in the territory of another state. *Cf. id.* at 1316 (recognizing that a nation having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it).

C.

What is the proper role of a state court in enforcing such an administrative subpoena?

Courts play a critical role in this administrative process. First, judicial involvement ensures administrative due process. "The system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena." *United States v. Security State Bank & Trust*, 473 *F.*2d 638, 642 (5th Cir. 1973). "Bifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power." *United States v. Bell*, 564 *F.*2d 953, 959 (Temp. Emer. Ct. App. 1977). Second, judicial enforcement clarifies the rights arising from specific disputes in matters concerning both the general public and the individuals involved. "One of the functions of a court is to compel a party to perform a duty which the law

requires at his [or her] hands." *Interstate Commerce Comm'n v. Brimson*, 154 *U.S.* 447, 487, 14 *S. Ct.* 1125, 1137, 38 *L. Ed.* 1047, 1061 (1894). Agency law invokes enforcement "in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it ***." *Ibid.* No question of contempt may arise until all issues are determined adversely to a party and that party has refused to obey a final order of the court. 154 *U.S.* at 488-89, 14 *S. Ct.* at 1137-38, 38 *L. Ed.* at 1061.

For those reasons of fairness and efficiency of administration, "federal courts have drawn a sharp distinction between agency power to *issue* subpoenas and judicial power to *enforce* them." *United States v. Hill*, 694 *F.*2d 258, 263 (D.C. Cir. 1982). Federal courts enforcing administrative subpoenas are strictly limited by their jurisdictional grants. On the other hand, the Legislature has given our courts plenary jurisdiction to enforce the agency's subpoena. *N.J.S.A.* 49:3-68.

Respondent insists that because New Jersey's courts have not the power to issue subpoenas beyond state lines, they have not the power to enforce subpoenas issued to out-of-state witnesses by agencies of the State. Citing *King v. Hochberg*, 17 *N.J. Super.* 533 (Ch. Div. 1952), respondent contends that New Jersey courts do not have the authority to compel the testimony of nonresident witnesses. Our Court Rules do limit the power to compel attendance of witnesses at a court hearing to those witnesses who may be served "within the State of New Jersey." *R.* 1:9-4. And our Court Rules authorizing the use in this State of the deposition of a non-party witness in a foreign state apply only if the foreign state has a reciprocal procedure. Sylvia B. Pressler, *Current N.J. Court Rules*, comment on *R.* 4:11-5 (1995). We do not believe that those Rules resolve the issue of *agency* power.

The Appellate Division reasoned that "[a] court cannot accord an agency's subpoena greater power than a subpoena issued in the name of the court via enforcement." 276 *N.J. Super.* at 10 (citing *Doumani v. Casino Control Comm'n*, 614 *F. Supp.* 1465, 1471 (D.N.J. 1985)). *Doumani* does not establish that proposition, but only that an agency's authority to regulate nonresident interests may not exceed the due process limits that restrain courts. 614 *F. Supp.* at 1471.

The issue, then, is not what the Court Rules permit or do not permit New Jersey courts to do. The issue is whether the State may grant an agency extraterritorial authority over nonresident witnesses consistent with due process principles. If the Legislature grants such power, the power role of a court under *N.J.S.A.* 49:3-68 is to ensure that principles of due process and comity between states have been observed in the issuance of the subpoena.

In that connection, we turn first to the provisions of *Rule* 1:9-6. That Rule sets forth the procedures for enforcement of a subpoena of a public officer or agency. Any application for compliance shall be on notice to the party subject to subpoena. Because the Bureau's enabling act does not specify the sanction for failure of a person to obey a subpoena, we may infer that only the usual procedures for relief to litigants under *Rule* 1:10-3 would be available. See *In re Daniels*, 118 *N.J.* 51, 60 (outlining the difference between criminal contempt and civil contempt in the form of relief to litigants), *cert. denied*, 498 *U.S.* 951, 111 *S. Ct.* 371, 112 *L. Ed.* 2d 333 (1990).

Because the party subpoenaed is, by definition, not within the jurisdiction, an order of confinement to achieve compliance would not be appropriate. See *In re Bridge*, 120 *N.J. Super.* 460, 468-69 (App. Div.) (discussing civil sanctions and confinement to secure compliance with order),

cert. denied 62 *N.J.* 80 (1972), *cert. denied*, 410 *U.S.* 991, 93 *S. Ct.* 1500, 36 *L. Ed.* 2d 189 (1973). A court granting relief to an agency seeking civil sanctions to enforce a subpoena would consider the provisions of *N.J.S.A.* 2A:10-5 (maximum $50 fine as penalty) and any payment to the aggrieved party authorized under *Rule* 1:10-3.

In considering other interests of due process and comity, a court may be guided by the familiar principles of international relations that seek to minimize "infringements upon foreign sovereignty." *SGPM, supra*, 636 *F.*2d at 1324. In deciding whether to exercise enforcement jurisdiction, courts should "balance the interests it seeks to protect against the interests of any other sovereign that might exercise authority over the same conduct." *Republic of Phil. v. Westinghouse Elec. Corp.*, 43 *F.*3d 65, 76 (3d Cir. 1994). Because each sovereign has an interest in the welfare of its citizens, we would add, in this context, that a court must consider (1) the extent and nature of the hardship that inconsistent enforcement actions would impose on the person subpoenaed; (2) the extent to which the required conduct is to take place in the territory of the other state; (3) the residence of the person subpoenaed; and (4) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state. To minimize the degree of intrusion on the sovereignty of the other state, we insist that in the future the process be served only by those authorized to do so under the laws of that state.

There is a concern that the State's efforts to subpoena an out-of-state witness and the enforcement proceedings of the court will be pointless because there will be no effective way thereafter to enforce the subpoena in a New Jersey court without the physical presence of the party in the forum. Respondent reminds us that "'[t]he doctrine that a court of

equity will not do a useless or vain thing is an ancient maxim of hornbook learning and general recognition.' 55 N.Y. Jur. 2d *Equity* § 106 (1994)," and cites *Fiedler v. Coast Finance Co., Inc.*, 129 *N.J. Eq.* 161, 169 (E. & A. 1941) ("Decree that would in the final result be nugatory should not be made.").

We agree that nugatory decrees should not be made. In the normal course of events, "[w]hen the process of adjudication is complete, all judgments are handed over to the litigant or executive officers, such as the sheriff or marshal, to execute. Steps which the litigant or executive department lawfully takes for their enforcement are a vindication rather than a usurpation of the court's power." *United States v. Morton Salt Co.*, 338 *U.S.* 632, 641, 70 *S. Ct.* 357, 363, 94 *L. Ed.* 401, 410 (1950). The sheriff of a New Jersey county has no authority to enter New York. However, it does not follow that an adjudication of civil contempt under our Court Rules is a fruitless exercise; such civil sanctions are entitled to full faith and credit in the foreign jurisdiction. *New York v. Sacco*, 242 *N.J. Super.* 699 (Law Div. 1990); *Gedeon v. Gedeon*, 630 *F.*2d 579 (Colo. 1981); *Robinson v. Robinson*, 487 *So.* 2d 67 (Fla. Dist. Ct. App. 1986). By later resort to the courts of the other state, the subpoenaed witness will be further guaranteed due process of law. In considering whether to accord full faith and credit to a judgment of another state, a forum state must consider whether the state rendering the judgment has jurisdiction over the defendant. *May v. Anderson*, 345 *U.S.* 528, 533, 73 *S. Ct.* 840, 843, 97 *L. Ed.* 1221, 1226-27 (1953).

IV

Fifth years ago, the U.S. Supreme Court decided that the assertion of jurisdiction by the courts of one state over a defendant from another state does not violate the Due Process

Clause of the Fourteenth Amendment if the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offer 'traditional notions of fair play and substantial justice.'" *International Shoe*, *supra*, 326 *U.S.* at 316, 66 *S. Ct.* at 158, 90 *L. Ed.* at 102 (quoting *Milliken*, *supra*, 311 *U.S.* at 463, 61 *S. Ct.* at 342, 85 *L. Ed.* at 283). Since *International Shoe*, state and federal courts have asserted original jurisdiction over residents throughout the United States, subject to the "minimum contacts" test. We believe that our decision today comports with the *International Shoe* doctrine and with the expanding role of states in the federalist system. Berkson can easily respond to the Bureau subpoena; trains, ferries, subways, buses, taxis, and private-passenger vehicles regularly cross the Hudson River to New Jersey. Moreover, the record suggests that he has been in New Jersey on several occasions in connection with the transactions that are the subject of the Bureau's investigation.

As the federal government reduces its regulatory role and state governments increase theirs, the need to develop coherent principles of cooperation among states intensifies. Ultimately, the U.S. Supreme Court may review this decision or a similar one. That review will close the circle and return the issue to the Court that decided *International Shoe*. In the meantime, a form of horizontal federalism, one in which states cooperate with each other in the discharge of their governmental duties, is both timely and reasonable. An example of such cooperation is the *Uniform Child Custody Jurisdiction Act*, codified in New Jersey at *N.J.S.A.* 2A:34-28 to -52, which defines the roles of states in enforcing conflicting claims to child custody.

Practical problems will inevitably arise concerning the extraterritorial enforcement of subpoenas. One response would be to wait until the state legislatures have adopted

appropriate laws. The need for such legislation extends throughout the United States. Organizations such as the Commissioners on Uniform State Laws and the American Law Institute are well situated to propose uniform or model laws for adoption in every state. See Pamela Jiminez, Comment, *International Securities Enforcement Cooperation Act and Memoranda of Understanding*, 31 *Harv. Int'l L.J.* 295 (1990) (providing examples of such compacts among nations). Our decision may serve to stimulate the adoption of such legislation. We believe, however, that we should respond to the issue now.

To sum up, we hold that it is reasonable to infer that the Legislature would, consistent with principles of due process, intend that the Bureau's administrative power to compel the attendance of witnesses be coextensive with its substantive mandate to investigate securities transactions "within or outside of this State." *N.J.S.A.* 49:3-68(a). Consistent with principles of due process, that authority shall be limited to subpoenaing witnesses who have purposefully availed themselves of the privilege to enter the New Jersey securities market. Before enforcing an agency subpoena, a court must determine that the party subpoenaed has engaged in such deliberate conduct. A court should consider the fairness to the witness and whether other available methods of discovery, such as videotaped depositions in the foreign state, would adequately serve the agency's needs without the inconvenience to the witness of appearing in New Jersey. Although this case presents the circumstance of a witness having to travel only a short distance from New York to Newark, there will be cases in which witnesses will need to travel from distant jurisdictions. In considering any civil sanctions to be imposed, a court shall not impose an order of arrest and shall limit monetary sanctions in accordance with the relevant principles applicable to *Rule* 1:10-3 procedures.

We express no opinion on the wisdom or fairness of the Bureau's policy of issuing subpoenas to those outside New Jersey, or the extent to which such a policy affects the relations between New Jersey and other states. We do not believe, however, that the limited breadth that we give to such subpoena power will offend principles of comity. Our decision does not authorize restraints on the liberty interests of persons outside New Jersey's borders. Finally, we acknowledge that the matter is entirely within the legislative ambit and would best be resolved there.

The judgment of the Appellate Division is reversed. The matter is remanded to the Chancery Division for further proceedings in accordance with this opinion.

CHIEF JUSTICE WILENTZ and JUSTICES HANDLER, POLLOCK, GARIBALDI and STEIN join in JUSTICE O'HERN'S opinion. JUSTICE COLEMAN did not participate.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0303-93T5

A. JARED SILVERMAN, CHIEF, NEW JERSEY BUREAU OF SECURITIES,

Plaintiff-Respondent,

v.

ROBERT GARY BERKSON,

Defendant-Appellant.

Argued January 24, 1994 - Decided June 20, 1994

Before Judges J.H. Coleman, Muir, Jr. and Levy.

On appeal from Superior Court, Chancery Division, General Equity Part, Essex County.

Richard F. Horowitz, admitted pro hac vice, argued the cause on behalf of appellant (Hellring, Lindeman, Goldstein & Siegal, attorneys; Bruce S. Etterman, on the brief).

Michael Pariser, Deputy Attorney General, argued the cause on behalf of respondent (Deborah T. Poritz, Attorney General, attorney).

PER CURIAM

In connection with a private investigation, the New Jersey Bureau of Securities (NJBS) issued an investigative subpoena requiring defendant's appearance at the NJBS offices in Newark. Defendant was served at his home in East Hills, New York by NJBS personnel. When defendant refused to comply with the subpoena, NJBS filed an enforcement action, pursuant to *R.* 1:9-6, by verified complaint. The court issued an order to show cause, to which defendant responded with a motion to dismiss the complaint, to discharge the order to show cause to quash the subpoena. The court ordered the enforcement requested by NJBS, and defendant appeals therefrom.

Defendant contends the subpoena cannot be served outside the State, while NJBS contends it is authorized to do so by *N.J.S.A.* 49:3-68 implemented by the court's long-arm jurisdiction based on minimum contacts with this state. We agree with defendant and reverse the order of August 25, 1993 which validated and enforced the subpoena.

NJBS posits *N.J.S.A.* 49:3-68(a), empowering a private investigation by NJBS "within or outside of this State," considered with *N.J.S.A.* 49:3-68(b), authorizing NJBS to "subpoena witnesses, compel their attendance, [and] take evidence," validates the investigatory subpoena it served on defendant. Enforceability, it argues, would follow if the subpoenaed witness had minimum contacts with this State. We reject this argument.

The authority granted by *N.J.S.A.* 49:3-68 anticipates enforcement of subpoenas in the courts of the foreign state where the investigation takes place and where the witness resides. This was the procedure followed in *King v. Hochberg*, 17 *N.J. Super.* 533 (Ch. Div. 1952). That court found no authority "to compel the examination of foreign

witnesses not served with subpoena within this State." *Id.* at 535.

R. 4:14-7 and *R.* 1:9-4 make it clear that a court may only consider enforcing a subpoena served within this State.

> The attendance of a witness at the taking of depositions may be compelled by subpoena, issued and served as prescribed by *R.*1:9 insofar as applicable....
>
> [*R.* 4:14-7(a)]
>
> .... A nonresident of this State subpoenaed within this State may be required to attend....
>
> [*R.* 4:14-7(b)(1)]
>
> A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey.
>
> [*R.* 1:9-4]

Under authority of *R.* 4:11-5, non-party witnesses may be compelled to testify at a deposition in another state and the deposition may be used in an action here. However that procedure is only available:

> if the sister state has a procedure, by rule or statute, similar to R. 4:11-4, which authorizes the foreign court to issue a deposition subpoena on petition in aid of foreign litigation. If it does not and if the witness is not a party, witness attendance at an out-of-state deposition can be compelled only by the issuance in this state of a commission or letter rogatory.

> [Pressler, *Current N.J. Court Rules*, Comment on *R.* 4:11-5 (1994)].

It is this type of procedural format envisioned by *N.J.S.A.* 49:3-68.

Considerations of the witness' contacts with this State are irrelevant. Pursuant to long-arm jurisdiction, New Jersey allows service of a summons and complaint to the fullest extent possible in order to afford due process of law, and maintenance of an action with this type of service of process does not offend notions of fair play and substantial justice. *See International Shoe Co. v. Washington*, 326 *U.S.* 310, 316, 66 *S. Ct.* 154, 158, 90 *L. Ed.* 2d 95, 102 (1945); *Lebel v. Everglades Marine, Inc.*, 115 *N.J.* 317, 322 (1989). We agree with the trial judge that defendant had minimum contacts with this State, but while that may support initiation of an action here by NJBS against defendant, it does not countenance issuance of a subpoena to compel appearance and testimony.

In criminal matters, the constitutional right of a defendant to subpoena witnesses does not extend to witnesses from without the State. *Minder v. Georgia*, 183 *U.S.* 559, 562, 22 *S. Ct.* 224, 225, 46 *L. Ed.* 328, 330 (1902)(the "lawmaking power of the state is powerless to make any provisions which would result in the compulsory attendance of the [out-of-state] witnesses...."). *See also State v. Smith*, 87 *N.J. Super.* 98, 102 (App. Div. 1965). In a grand jury investigation or a criminal proceeding, a nonresident may be subject to an enforceable subpoena pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, adopted in this State as *N.J.S.A.* 2A:81-18 to 23. Since NJBS private investigations are not criminal proceedings, that act is not germane here, but it illustrates a

procedural scheme for criminal matters similar to our procedures in civil matters.

Service of subpoena here violates defendant's due process rights. A court cannot accord an agency's subpoena greater power than a subpoena issued in the name of the court via enforcement. *Doumani v. Casino Control Comm'n. of N.J.*, 614 *F. Supp.* 1465, 1471 (D.N.J. 1985). *Doumani* involved the attempt of nonresident indirect owners of stock in a casino to enjoin the Casino Control Commission from holding hearings concerning those owners' qualifications. The commission's decision after the hearings would affect all ownership interests in the casino since its license would be in jeopardy if it failed to comply with the commission's decision. The nonresident owners' interest were properly before the commission, but no attempt was made to subpoena them or in any way compel their attendance at the hearings. There the court said:

> [i]n New Jersey, the courts are permitted to exercise jurisdiction over nonresidents to the outer limits of the due process requirements of the U.S. Constitution. As a state agency whose actions are reviewable in the courts of the State of New Jersey, the Commission is subject to identical limits.
>
> [*Id.* at 1471].

See also In re Addonizio, 53 *N.J.* 107, 120-21 (1968).

Accordingly, the subpoena must be quashed, the enforcement action dismissed and the order reversed.

Reversed.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, ESSEX COUNTY
Docket No. C-189-93

SILVERMAN,	)	
	)	
Plaintiff	)	
	)	TRANSCRIPT
vs.	)	OF
	)	HEARING
BERKSON,	)	
	)	
Defendant	)	

Place: Essex County Courthouse
Newark, New Jersey 07102

Date: August 25, 1993

Before:

HON. HARRY A. MARGOLIS, J.S.C.

Transcript Ordered By:

STEPHEN L. DREYFUSS, ESQ. (Hellring Lindeman Goldstein & Siegal)

Appearances:

MICHAEL PARISER, ESQ., Deputy Attorney General For Plaintiff, Bureau of Securities

STEPHEN L. DREYFUSS, ESQ. (Hellring Lindeman Goldstein & Siegal)
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Argument

THE COURT: May we have your appearances, please?

MR. PARISER: Michael Pariser, Deputy Attorney General, for the Bureau of Securities, Your Honor.

MR. DREYFUSS: Hellring Lindeman Goldstein & Siegal by Stephen L. Dreyfuss, for the defendant, Robert Gary Berkson. In addition, Your Honor, I'm accompanied by Richard F. Horowitz of the New York Bar and I have submitted an application in which I would move this time for him to be permitted to speak under Rule 121-2.

THE COURT: Welcome.

MR. HOROWITZ: Good morning, Your Honor, thank you kindly.

THE COURT: Go ahead, Mr. Pariser.

MR. PARISER: Thank you, Your Honor. The reason we're here today is that the Bureau is seeking to enforce a subpoena that it issued back in December of 1992 to have Mr. Berkson appear and testify before the Bureau of Securities. Mr. Berkson has refused to comply with that subpoena, which is a lawful subpoena issued pursuant to 49:3-68 which authorizes the Chief of the Bureau of Securities to issue subpoenas to out-of-state residents and allows them to turn to this Court for enforcement of those subpoenas. I think the -- without going through everything that was in the briefs filed in this Court today, a couple of points I would just like to make briefly at this point are, one, that what -- I think this is what the Court in *Dumani* was saying, the Federal Court that I cited in the brief, which is that just as the Courts in this State in fulfilling their functions may exercise long-arm jurisdiction to the extent allowed by the 14th Amendment, the agencies of the state have that same

power. What we have to realize is they have very different functions. The Court's function, obviously, is to adjudicate between litigants and to that extent, they have the power to bring out-of-state litigants into this State. The function of the Bureau that we're concerned with here is its investigatory functions, to see to it that the laws of the Securities Act are complied with, and to that extent, the way they fulfill that role is, as laid out in 49:3-68B, by subpoenaing witnesses, by compelling their testimony, by demanding documents, and that's what's being done here. I think we have the clear grant of statutory authority, I think there is no constitutional bar to exercising that authority, other than the due process requirements of the 14th Amendment, which require only that minimal contact be shown between the person with whom the State is seeking to assert jurisdiction, and I think we've shown that on the certification filed by Mr. O'Conner with the Bureau. The only other point I'd like to make now is that -- I'm sure the Court is aware of this but it wasn't mentioned in the briefs -- that the sale of securities are very rarely and purely intrastate matter and to bar the Bureau from exercising its authority under 49:3-68 would basically be the same as tying the Bureau's hands when it comes to protecting the investing public of New Jersey. I think that's an issue to be considered at this point. If I can, I'd like to reserve a few minutes for afterwards at this point and --

THE COURT: Right.

MR. HOROWITZ: Your Honor, the issue before this Court is quite simple, whether this Court in aid of a subpoena issued by the Bureau of Securities can exercise extraterritorial power in aid of that subpoena where the Court couldn't in aid of its own subpoena. It is quite clear that a Court in this State cannot have a subpoena issued by that Court served --

Argument

THE COURT: There is a difference in the function of a Court issuing a subpoena as opposed to the Court ordering the compliance with a subpoena. The Court has no power to issue the subpoena, but it has the power to compel compliance with it. They are two distinctly separate actions and two distinctly separate powers. This Court has no power to issue extraterritorial subpoenas, but it's not being called upon to do that.

MR. HOROWITZ: It's being called upon to issue an order to enforce an extraterritorial subpoena --

THE COURT: That is quite different.

MR. HOROWITZ: -- without any basis in the statute, empowering either the issuance of an extraterritorial subpoena or the enforcement of an extraterritorial subpoena. Your Honor, one would have thought that if the Legislature intended to grant them power to issue a subpoena and to serve it out of state, the Legislature would have said so, Your Honor.

THE COURT: Or, the Legislature felt it didn't have to.

MR. HOROWITZ: Your Honor, I respectfully submit that -- that that's backwards in the following sense. That one would assume that an administrative subpoena should not have territorial scope beyond that of a Court subpoena unless the Legislature said so. I would say further to the Court that if we look at the enabling statute, subsection A of 49:3-68, it says they can conduct investigations in the State and out of the State. Subsection B says, in connection with investigations they can issue subpoenas. B is obviously right after A. If the Legislature had intended that their subpoenas could go beyond the State of New Jersey, it would have used the same

language in B as it did in A. It didn't. It didn't, Your Honor, because it didn't intend to and because, as we point out in our Memorandum of Law, to have done so would have been unconstitutional. Now, Mr. Pariser refers the Court to the *Dumani* case. The *Dumani* case we think supports our position. The *Dumani* case says that an administrative agency -- in that case, the Casino Control Commission -- is governed by the same limitations as Courts. Administrative agencies don't have powers beyond those of Courts. And, Your Honor, the Courts don't have power in New Jersey, and I respectfully submit under the Constitution of the United States, anywhere else, to issue subpoenas and to serve them outside of the State. Your Honor, in regard to powers granted to administrative agencies, we've cited the Court to the cases, such as *Hackensack Water Company v. Ruda* (phonetic), the *Boren* (phonetic) case, for the proposition that you don't imply administrative agencies' powers. They have to be expressly set forth in the statute. As the Court said -- the Supreme Court of New Jersey -- in the *Ruda* case, the power must be given, quote, directly in language admitting of no doubt of the purpose, and the *Boren* case is to the same effect. And once again, Your Honor, the *Dumani* case and also the *Addinisio*, which we've cited in our Memorandum of Law, stand for the proposition administrative agencies are governed by the same limitations as the Courts. And why is that, Your Honor? It is because we have a constitutional overhang here. What's the constitutional overhang? The Supreme Court of the United States in *Minder (phonetic) v. Georgia* said, and I quote, the law making power of the State is powerless to make any provision which would result in the compulsory attendance of out-of-state witnesses. Now to be sure, that was a 1902 case, an International Shoe which didn't

deal with subpoenas but dealt with summonses, was decided by the Supreme Court in 1945. But, Your Honor, the New Jersey Appellate Division in 1965 in State of *New Jersey v. Smith* cited *Minder* with approval and, Your Honor, in *Preston v. Blackledge* (phonetic), the North Carolina Federal Court case, which counsel have cited in their Reply Memorandum, that case actually supports our argument, Your Honor. And let me take you through it briefly. The *Preston* case cites *Minder* for the proposition, once again, that the Legislative power of a State is powerless to make provision which would result in compulsory attendance of non-witnesses. They quote that portion. And *Preston* refers to *Minder* for that portion. Then they use an ellipsis, three dots, and then they quote the portion of *Preston* which says that there now is a procedure by which a non-resident witness can be brought in in a criminal case. Your Honor, examination of the material that they've left out by the convenient use of the ellipsis is critical. What it does, it describes the procedure under the Uniform Act to secure the attendance of witnesses from without a State in criminal proceedings which has been adopted by this and many other States. First of all, Your Honor, preliminarily, that procedure is pursuant to a statute to be used in a criminal case; this is not a criminal case. And the procedure is for New Jersey to request the Court in the witness' home state to invoke the jurisdiction of that Court, the Court in the witness' home state, to require the witness to testify in New Jersey. The critical point is that the jurisdiction of New Jersey is not being invoked, the jurisdiction of the Court in the witness' home state is being invoked. And why is this, Your Honor? This is because under *Minder*, as reaffirmed in the *Smith* case and, we submit, in the *Preston* case, New Jersey is powerless to make

a provision which would utilize New Jersey's jurisdiction to compel the attendance of a non-resident witness in this State. For these reasons, Your Honor, we submit, first of all, that under the Court Rules, under the enabling statute, properly interpreted, the out-of-state subpoena was improper; we submit similarly that it would be improper for this Court to attempt to enforce that subpoena; we submit that for the Court to do so would be to violate the Constitution of the United States. We refer to the well-established maxim of statutory and rule interpretation that when there is a potential constitutional question and there are two interpretations of a rule or a statute -- incidentally, we don't think there are two reasonable interpretations, we think there is but one -- but assuming there were two, that the Court should interpret the rule or the statute, or both, in such a manner as to avoid the constitutional question. Your Honor, just a small point with regard to the motion that the record in this case be sealed, the Bureau's point seems to be that their investigations are private. Assuming that their investigations are private, Your Honor, this is a subpoena enforcement proceeding, no testimony is being taken rubric or the context of this proceeding. If Mr. Berkson were required to honor this subpoena, then maybe, or maybe not, the proceedings then would be private, but that's for another day and that's another matter. Your Honor, unless the Court has any questions, or unless the remarks made by Mr. Pariser prompt a response, I will rest on our papers at this point, with the final observation that as we've stated in our papers, we question the jurisdiction of this Court over Mr. Berkson for the purpose of this proceeding itself and I don't want to belabor that point but I want to state that our appearance today in opposition to this proceeding is without prejudice to our

position, with all due respect to the Court, that it has no jurisdiction over Mr. Berkson for this proceeding itself. Thank you, Your Honor.

MR. PARISER: If I may respond briefly. As far as the sealing goes, we'll rest on the record as it is. I'd like to respond to some of the other points raised, again very briefly. First of all, I'd like to reiterate that I see no uncertainty or doubt in the statute. Again -- you know, again at the risk of belaboring this point, 49:3-68 gives the Bureau Chief the power to conduct investigations out of state, his investigatory powers are immediately defined as including the power to issue subpoenas; I don't know how much clearer this could have been. The alternative is to have said that each power -- that -- I'm trying to think of the alternative; the alternative might have meant the Legislature to say they had the power to out of state for a subpoena, they had the power to go out of state to demand papers, they had power to out of state -- there's no reason for it. They've said it once, they then go in and define what the power is, what the investigatory powers of the Bureau Chief are. I think that's clear on its face. As far as the power of this Court to enforce that subpoena, again, we don't need to look to Court Rules, we need to look to 49:3-68C, which specifically authorizes the Superior Court, upon application of the Bureau Chief, to issue an order requiring the person to comply with the subpoena issued under 49:3-68. I think the crux of what's happening here is that the way *Dumani* is being interpreted, to say that the limits on the Bureau in asserting long-arm jurisdiction are the same as the Rules of the Court is a serious misreading of that case. That case, in talking about the constitutional limits, the exercise of long-arm jurisdiction, first says that the Courts of this State can exercise that jurisdiction to the limits of the

14th Amendment and immediately says that an agency is subject to the same limits. There is no other reading of that, other than to say that the same constitutional limits of due process that apply to the Court's exercise of that jurisdiction apply to an agency's exercise of jurisdiction. To try to use that language to graft onto the agencies all the requirements of the Court Rules is, I think, a serious misreading of the case that something can't be supported. I think it would be absurd to say that Rules promulgated by the Court for the administration of its functions should apply to a state agency, there's just nothing to support that. *Minder*, as was alluded to by counsel, is a 1905 case that was not a constitutional analysis of the question of whether a state has the power to subpoena out-of-Court witnesses. That was a case which clearly -- that there was no mechanism for bringing those people in and, therefore, the Court was under no obligation in a criminal trial to bring that witness in, in order to satisfy the constitutional rights of the accused. The later case cited, the '75 case with *Preston*, simply says, well, now we have a mechanism, *Minder* is no longer a bar. Again, this is a 1905 case, it was 4 decades before *International Shoe*, its relevance to any current constitutional analysis of long-arm jurisdiction is I think dubious at best. I think the bottom line here is that the Legislature has given the Bureau a clear grant of authority to issue subpoenas to non-residents, I think the Legislature has clearly authorized this Court to enforce those subpoenas, I think the Rules of this Court are binding upon this Court in judicial matters and matters that are pending before this Court, they have no relevance at all to the Bureau -- to the statute that the Bureau is relying on to issue the subpoena and to have this subpoena enforced. Unless the Court has any other questions, I'll rest my case.

Argument

MR. HOROWITZ: May I be heard briefly in response to Mr. Pariser?

THE COURT: Yes.

MR. HOROWITZ: First of all, with regard to the language of the statute, the words that are in subdivision A, which are not in subdivision B, are, quote, within or outside of this State. If I'm counting right, that's 6 words. It would have been real easy to put it in B the same way as they put it in A. With regard to *Dumani*, we've stated our position with regard to that case. The critical point is, that's not a subpoena case; that's a summons case. And notwithstanding the Bureau's efforts to blend summonses and subpoenas and make them equal, or the same, for the purposes of jurisdiction, that just doesn't fly.

THE COURT: *Dumani* was a summons case?

MR. PARISER: *Dumani* was an administrative hearing case, Judge.

THE COURT: It was an administrative hearing case, sir. It wasn't a summons case at all.

MR. HOROWITZ: *Dumani* was a motion for a preliminary injunction against an investigation of non-resident shareholders of a --

THE COURT: It's an administrative hearing.

MR. HOROWITZ: Of a casino. Yes, but there was no -- it was not a question of bringing them into the state to testify, Your Honor.

THE COURT: That's what the -- that's what the issue is in *Dumani*, whether there was personal jurisdiction obtained over them.

Argument

MR. HOROWITZ: Whether there was personal jurisdiction obtained over them, Your Honor, for purposes of conducting a hearing, but not with respect to bringing them into the state to testify.

THE COURT: That's a small difference.

MR. HOROWITZ: Pardon me?

THE COURT: That's a small difference.

MR. HOROWITZ: I think it's a significant difference, Your Honor. With regard to the Minder case, I think *Minder* is a constitutional case. When -- I think it's clear that it's a constitutional case. When a Court says -- when the Supreme Court says that, quote, the law making power of the State is powerless to make any provision which would result in the compulsory attendance of out-of-state witnesses, that sounds to me like a constitutional mandate and it's been interpreted that way in the cases since then.

MR. PARISER: But three words exactly. 49:3-68B, for the purposes of any investigational proceeding -- just to point out that it clearly includes anything -- or any investigation under the act --

Findings

THE COURT: What I am first going to do is quote some sections of Donald O'Conner's certification. He starts off -- and I'm going to interpolate because I'm not going to read the entire certification. Wagard *phonetic* is a New Jersey corporation which was owned by Victor and Lillian Wagard. From this entire period Wagard's headquarters -- that is from 1959 through September 1991 -- Wagard's

headquarters were always maintained within the State of New Jersey and Wagard had no offices outside the State. Berkson was employed by First Jersey Securities, Inc., a broker dealer registered with the Bureau from January 1975 until July 1980, and thereafter from February 1992 until the present, and remains so today. On or about October 12, 1976, Berkson and the Bureau Chief entered into a stipulation regarding Berkson's request for an adjournment of a hearing on the proposed order of revocation pending disposition of certain appeals. The stipulation provided that Berkson shall neither affect, nor attempt to affect, securities transactions of any nature within or from the State of New Jersey or for -- or on behalf of any New Jersey resident until such time as hearing has been held with regard to the allegations set forth in the proposed order of revocation entered on July 30, 1976. A hearing with respect to the proposed order has never been held. First Jersey is wholly owned by Robert Brennan. Roger Barnett (phonetic) has been president of First Jersey from 1974 until the present. When asked by Bureau investigators on May 27, 1992, Barnett described Berkson's role at First Jersey as being an agent who keeps in touch with public companies they have an interest in. Bureau staff has evidence that Berkson was involved in transactions and events which led to Leonard Greer acquiring Wagard and that this and other information in Berkson's possession is material to the Bureau's investigation into Wagard. The Bureau has evidence that Berkson travelled to the offices of Wagard in Bernardsville, New Jersey on at least two occasions for the express purpose of negotiating the sale of Wagard. The Bureau's investigation -- Berkson also conducted meetings regarding the sale of Wagard in the offices of First Jersey in New York. The Bureau's investigation is looking into the

acquisition of Wagard by Greer. Berkson was instrumental in the negotiation of a quick and call agreement. That agreement was an option to buy the firm that Hart (phonetic) purchased from Victor and Lillian Wagard for $125,000. Berkson was also involved in the substitution of Greer for Hart when Hart sold the option to purchase the firm to Greer. Greer purchased Wagard on or about September 19, 1991. The Bureau has evidence that Berkson communicated frequently with Greer after Greer purchased Wagard through numerous phone calls and facsimile transmissions from Bernardsville offices of Wagard to Berkson's direct phone line and the facsimile machine located in the offices of First Jersey. The Bureau has evidence that Berkson conducted meetings at the offices of First Jersey regarding the merger of Nacoma (phonetic) into a blind pool named L.S. Capital, Inc. Nacoma was subsequently heavily recommended by Hiberd (phonetic) and was sold by Hiberd from New Jersey branch offices and to New Jersey residents in March of 1991 at $2.50 a share, and in June of 1991 at $3.00 per share. The Bureau has evidence that Berkson held at least one meeting at the offices of First Jersey to give the final approval for the merger of the Site Based into a blind pool named Future Funding. The merger occurred in approximately March of 1991. First Jersey acquired through various entities, including First Jersey, an excess of $6.7 million of the $7,000,000 outstanding units of Site Based. Site Based stock was subsequently heavily recommended by Hiberd and Wagard, was sold by them to New Jersey residents. There is reason to believe that Berkson held at least one meeting at the offices of First Jersey pertaining to the merger of Treats (phonetic) into a blind pool named S.L. Resources. First Jersey acquired through various entities in excess of 6.7

million units of the $7,000,000 outstanding units of Treats over a period of time. Treats was subsequently a heavily recommended stock of Hiberd that was sold from New Jersey branch offices and to New Jersey residents at $3.25 per share. The sale of Treats stock by Hiberd and F.N. Wolfe is the subject of an action brought by the Securities and Exchange Commission in the U.S. District Court for the Southern District of New Jersey. Sanyo stock was subsequently heavily recommended by Wagard and was sold by Wagard to New Jersey residents at $2.00 a share. The statutory authority claimed by the Bureau is as follows. 49:3-68B and A. The Bureau Chief, in his discretion, may make such private investigations within or without -- within or outside of the State as he deems necessary to determine whether any person has violated, or is about to violate, any provision of this law or any rule or order hereunder, which aid in the enforcement of this law or in the prescribing of rules and forms hereunder; two, may require or permit any person to file a statement in writing under oath or otherwise as the Bureau Chief determines as to all facts and circumstances concerning the matter to be investigated; and three, may publish information concerning any violation of this act for any rule or order hereunder, provided there shall be no publication until such rule or order becomes effective. B, for the purpose of any investigation or proceeding under this law, the Bureau Chief or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the Bureau Chief deems relevant or material to the inquiry. Under 1-96B of our Court Rules, the following language is found. If, in

such a case, the statute does not provide for an application ex parte, an order to show cause may issue on the motion and supporting affidavit. The order shall be made returnable in not less than two, nor more than 10 days, requiring such person to show cause before the Court why he should not comply with the subpoena or other direction, or refrain from such misconduct, and upon the return of the order, the Court shall afford him an opportunity to be heard under oath. If the Court determines that the person failed without justification to obey the subpoena or other direction, answer a proper question, produce any such thing, or has been guilty of misconduct, it may order him to appear before the office or agency at a time or times and place mentioned in the order and there to proceed as may be directed in the order. That brings us to the issue set forth in *Dumani*, and I cite Dumani as 614 Fed. Supp. 1465, District Court of New Jersey 1985. And I begin my reading at page 1471. Plaintiffs assert the Commission is powerless to proceed with hearings as to their independence from Edward Dumani because the Commission lacks personal jurisdiction over them. The Commission's jurisdiction is alleged to be defective because it is founded solely on plaintiff's mere ownership of stock in GNI. According to plaintiffs, who are residents -- citizens and residents of Nevada, they have no significant contact with the State of New Jersey. The due process clause of the 14th Amendment requires that at least minimal contacts exist between a foreign state and any party over whom the state seeks to exercise jurisdiction. Such a minimal relationship guarantees that jurisdiction will be enforced in a manner consistent with traditional notions of fair play and substantial justice, citing *International Shoe* and other authorities, cites omitted. In New Jersey, the Courts are permitted to exercise

jurisdiction over non-residents to the outer limits of due process requirements of the U.S. Constitution, citing *Delmahose (phonetic) v. Marrin (phonetic)*, 83 NJ 282 at 291, and *Avdel Corporation v. McCure (phonetic)*, 58 NJ 264. As a State agency whose actions are reviewable in the Courts of the State of New Jersey, the Commission is subject to identical limits. Accordingly, plaintiffs challenge the Commission's jurisdiction over them on the grounds that they have never conducted business in New Jersey and have never enjoyed the protection of its laws. Over to page 1472. Plaintiffs' summary of the existing law of personal jurisdiction is selective and overly restrictive. The minimum context test is not rigid and susceptible to mechanical application. The requirements of due process must be evaluated in light of the affiliating circumstances present in a given case. Furthermore, in cases involving commercial activity, the Supreme Court has gradually extended the scope of in persona jurisdiction. A party engaged in commercial transactions in interstate commerce which cause significant effects in a particular state is likely to be subject to the jurisdiction of that state, so long as the result is reasonable. Citing *Cocoa* (phonetic) and others. The defendant's proceedings against various members of the Dumani family are based on findings that plaintiffs' substantial stock interest in GNI causes significant effects on the casino industry in New Jersey. This conclusion appears reasonable. Furthermore, the record is full of evidence that plaintiffs engage in acts which they could reasonably have anticipated would affect the casino industry and subject them to the Commission's jurisdiction. Reading now from *Matter of Mutual Benefit*, cited at 258 NJ Super 356, Superior Court of New Jersey, Appellate Division, 1992. In the context of

specific -- at page 370 -- in the context of specific jurisdiction, the inquiry as to minimum contacts requires an analysis of the relationship among the non-resident form and the litigation. Cites omitted. Minimum contacts exist if they resulted from the non-resident's purposeful conduct and not the unilateral activities of the plaintiff. As our Supreme Court noted in *LaBelle (phonetic) v. Everglades Marina, Inc.*, this purposeful availment requirement insures that a defendant will not be hailed into a jurisdiction solely as a result of random, fortuitous or attenuated contacts. The question is whether the defendant's contact -- conduct and connection with the -- is such that he should reasonably anticipate being hailed into Court there. Of course, the mere foreseeability of an event in another state is not a sufficient benchmark for exercising personal jurisdiction. And over to page 371. Once minimum contacts have been established, it is necessary to determine whether asserting jurisdiction over the non-resident would offend traditional notions of fair play and substantial justice, citing *LaBelle*. In this respect, a non-resident whose activities establish minimal contacts must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable. Under this prong of the due process test, a variety of factors may be considered, such as the burden on the non-resident, the foreign state's interest in adjudicating the dispute, the resident's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies. This may also be found in *Charles Gendler (phonetic) v. Helcon (phonetic)*, 102 NJ 460 at page 469, 1986. The Uniform Securities Law is an industry well regulated in New

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Jersey and defendant is an artful manipulator within that industry. He is an employee of First Jersey, a broker dealer registered in New Jersey for close to 20 years. Over the course of the last few years, he has had repeated substantial contacts within New Jersey related to the Bureau's pending investigation. In 1991, he was instrumental in negotiating the purchase of Wagard, a New Jersey broker dealer, by one Hart, a former First Jersey employee. He was also involved in the subsequent sale of Wagard to Greer. Both Wagard and Greer, as well as Greer's acquisition of Wagard, are the subject of the Bureau's current investigation. The investigation is also focussing on trading activity in the securities of Nacoma, Site Based, Treats and Sanyo. Berkson, over the last few years, conducted a series of meetings at the offices of First Jersey. Those meetings concerned the merger of Nacoma, Site Based, Treats and Sanyo into blind pools. Millions of units of these securities were then acquired by Berkson's employer, First Jersey, and were subsequently sold to investors in New Jersey. It was certainly reasonable to anticipate that Berkson, who was packaging these securities for sale to New Jersey investors, could have anticipated that he would be subject to jurisdiction within the State. It was reasonable that he could foresee the effects that his activities would have on the securities market in New Jersey. The predicate for the service of subpoenas is not the New Jersey Court Rules. The New Jersey Rules do not pertain to investigative subpoenas nor do they represent the limits of the Court's extraterritorial jurisdiction. The subpoena plaintiff is seeking to enforce was not issued in connection with any judicial proceedings or pursuant to Court Rules. It was issued pursuant to a statute that specifically provides for out-of-state investigations and subpoenas. The enforcement of the

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subpoena is based on 49:3-68C, which reads as follows. In case of contumacy by or refusal to obey a subpoena issued to any person, the Superior Court, upon application by the Bureau Chief may issue to the person an order requiring him to appear before the Bureau Chief or the officer designated by him, there to produce documentary evidence, if so ordered, or to give evidence touching the matter under investigation or in question. The Court may grant injunctive relief restraining the issuance, sale or offer for sale, purchase or offer to purchase, promotion, negotiation, advertisement or distribution from within the state of any securities by a person or agent, employee, broker, partner, officer, director or stockholder thereof until such person has fully complied with such subpoena and the Bureau has completed its investigation. The Court may proceed in the action in a summary manner. The Rules of Court do not define the limits of constitutional due process. The effect of the service of the subpoena relies on the minimal contacts of the defendant within the State. Once the minimal contacts have been established, then the test is whether the service of the subpoena is or is not offensive to traditional notices of fair play and substantial justice. To allow defendant to reside in New York, do business in New Jersey more than minimally, and effect a well-regulated industry in New Jersey, without fear of investigation or subpoena, is offensive to traditional notions of fair play and substantial justice. I will enforce the subpoena.

MR. DREYFUSS: Your Honor, as I understand it, the subpoena which is before you was the original subpoena and is returnable some point in the past. Since no date has yet been set by the Bureau for the appearance of this defendant,

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I respectfully request that the Court issue a stay pending appeal under 2:9-5 so that we can seek Appellate review.

THE COURT: I will issue a stay for three days, within which time you can seek an appeal. Incidentally, I will not seal the record on this proceeding. Thank you.

I, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Essex County Civil Court, on August 25, 1993, Tape No. 1, Index No. 0065 to 2607, is a true and accurate record of the proceedings.

August 26, 1993 Signature Marie Roberts

Marie Roberts AOC #355
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